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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1406~~ 218

HARTFORD ACCIDENT AND INDEMNITY COMPANY, and C. O. BRAND INC.,

Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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CONTINENTAL CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioners, Hartford Accident and Indemnity Company and C. O. Brand, Inc., hereby pray for Writ of Certiorari to issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 25, 1966, rehearing denied March 16, 1966.

Opinion Below.

On January 25, 1966, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment which is reported in 355 F. 2d 969, a copy of same being attached hereto in Appendix "A". Thereafter, a Petition for Rehearing was filed and the same was denied on March 16, 1966. The judgment and opin-

ion of the Circuit Court of Appeals reversed an opinion of the United States District Court for the Western District of Texas, which decision is unreported.

Federal Jurisdiction.

Suit was originally brought in the United States District Court for the District of Texas, Western Division, under the provisions of the Miller Act, 40 U.S.C. §270 (49 Stat. 794, August 24, 1935, Chap. 642) a copy of which is attached hereto in Appendix "B."[1] The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1) (62 Stat. 928, June 25, 1948, Chap. 646).

Statement of the Case.

This case involves an action on a surety bond furnished under the provisions of the Capehart Housing Act, 42 U.S.C. §1594 *et seq.* (Aug. 11, 1955, chap. 783, Title IV, §403, 69 Stat. 651, as amended), a copy of which is attached hereto in Appendix "C." Pursuant to the act, Hal B Hayes, Inc. (hereinafter referred to as Hayes Inc.), as the prime contractor (or in the parlance of the Capehart Act, the "eligible builder") entered into a contract with the United States of America to build 410 military housing units at Ft. Bliss, El Paso, Texas. Under the Capehart Housing Act, Hayes, Inc., as the prime contractor, was required to provide a Payment and Performance Bond by a surety satisfactory to the Secretary of Defense. In this case such

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[1]Ten suits instituted pursuant to the Miller Act were consolidated by the trial court, Vol. 1, Record on Appeal, p. 36. Defendants moved to dismiss the proceedings as not being within the purview of the Miller Act, but the motions were denied and the court retained jurisdiction by virtue of the Miller Act, 40 U.S.C. §270b(b).

bond was furnished by the defendant Continental Casualty Company (hereinafter referred to as Continental), as surety, and Hayes Inc. as principal. In addition, as required by the Capehart Housing Act, Hayes Inc. organized a separate company to stand as owner of the project during construction. This company, which in the parlance of the Capehart Housing Act is called the mortgagor-builder, bore the name Nike Village.

After the project was organized, Hayes Inc. entered into a contract with one of the petitioners herein, C. O. Brand, Inc. (hereinafter referred to as Brand) wherein Brand was to act as a subcontractor on the project. In connection with the subcontract between Hayes Inc. and Brand, Brand furnished a Payment and Performance Bond. The surety on the Brand bond was petitioner Hartford Accident and Indemnity Company (hereinafter referred to as Hartford).

Before completion of the project, Hayes Inc. became insolvent and defaulted on its contract with the United States and Continental, as Hayes Inc.'s surety, was compelled to and did complete the construction project. At the time of default, Hayes Inc. owed money to Brand in connection with Brand's performance as a subcontractor. In addition, Brand owed money to ten sub-subcontractors and materialmen who had furnished labor and materials to Brand.

Thereafter, Brand on its own behalf and the respective ten sub-subcontractors and materialmen instituted suit against Continental on its Payment Bond. Also named as defendants in said suits were Hayes Inc., Nike Village, Hartford and other persons and concerns. All suits were consolidated for trial.

Prior to pre-trial, Hartford, in discharge of its obligations under its Payment Bond, paid the claims of the ten sub-subcontractors and materialmen to whom Brand owed money. In connection with such payment, Hartford obtained assignments of the said claims and was subsequently substituted in as party plaintiff in lieu of said ten claimants.

Thereafter, the matter proceeded to trial, Brand proceeding in its own right and Hartford proceeding as the subrogee and assignee of the ten claimants.[2]

After trial in January, 1962 and submission of the matter upon briefs, judgment was ordered against Continental and in favor of Hartford for the sum of $102,266.01 and in favor of Brand, for the sum of $72,932.99, an aggregate of $175,199.00.

On appeal, the Fifth Circuit Court of Appeals reversed. The appellate court held that the Miller Act did not govern actions against a Capehart surety and accordingly preliminary notice of claim given in accordance with the Miller Act was not sufficient to maintain suit against the Capehart surety Continental. The court further held that in order to maintain an action against a Capehart surety, a claimant must give the additional preliminary notice provided by the Continental bond form. Although recognizing that actual notice and knowledge was obtained by the necessary parties, the court held that because there was not literal and technical compliance with the Continental bond form, the judgment must be reversed.

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[2]The answers of Hayes, Nike Village and others were stricken and their default entered by reason of their failure to answer interrogatories.

The Miller Act, 40 U.S.C. §270, as a prerequisite to suit against a surety, requires a claimant who does not have a direct contractual relationship with the prime contractor, to give such contractor a preliminary notice by registered mail. Such notice must set forth the nature of the claim, the amount thereof, and the party for whom the work was performed.

The bond form as used in the instant case required every claimant, as a prerequisite to suit, to furnish similar information, also to be sent by registered letter, to any two of three persons, viz., (1) the prime contractor, or (2) any of the obligees or the lender, or (3) the surety.

The essence of the trial court's findings as they effect this petition were as follows:

a. Brand was a subcontractor having a direct contractual relation with Hayes Inc., the prime contractor.[3]

b. Hayes Inc. and Nike Village, although purportedly different entities, were in fact one and the same and what was known by one was known by both.[4]

c. Within the requisite time and prior to suit Brand gave written preliminary notice to Hayes Inc. and Nike Village of its claim including that of the ten sub-subcontractors and materialmen. Although notice was directed to Hayes Inc., Nike Village, as a result of the facts set forth in "b" above, also obtained actual knowledge of the claims.[5]

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[3]Findings Nos. 9 and 12, Vol. 1, Record on Appeal, pp. 92, 93 and 94.

[4]Findings 4, 6 and 9, Vol. 1, Record on Appeal, pp. 91, 92 and 93.

[5]Findings 4, 6, 9, 23 and 24, Vol. 1, Record on Appeal, pp. 90-98 incl.; Exs. B-8 and B-9, pp. 199 and 202, Vol. 2, Record on Appeal.

d. In addition, within the requisite time for giving preliminary notice, Continental had actual notice of the claim of Brand.[6]

Despite these specific findings, the Fifth Circuit Court of Appeals reversed, holding that compliance with the Miller Act was insufficient and that by virtue of a 1956 Amendment to the Capehart Housing Act, the strict and formal preliminary notice requirements of the Continental bond form had not been met.

Questions Presented.

1. Whether the 1956 Amendment to the Capehart Housing Act which merely provides for the furnishing of sureties satisfactory to the Secretary of Defense, empowered the Secretary of Defense to establish notice requirements in connection with suits against such sureties, which notice requirements are different and substantially more strict than required by the Miller Act, 40 U.S.C. §270b(a).

2. Assuming, *arguendo,* that the Secretary of Defense was empowered to impose stricter notice requirements than those imposed by the Miller Act so as to require notice to various persons, was there compliance with such requirement as to one such person by the giving of such notice to his *alter ego.*

3. Assuming, *arguendo,* that the Secretary of Defense was empowered to impose stricter notice requirements than those imposed by the Miller Act so as to require notice to various persons, was there compliance with such requirement as to one such person by his having actual knowledge and notice of a claim.

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[6]Finding 25, Vol. 1, Record on Appeal, p. 98.

4. Assuming, *arguendo*, that the Secretary of Defense was empowered to impose notice requirements other than required by the Miller Act so as to require a dual-notice, did not the circuit court of appeals err in ignoring the specific findings of the trial court that claimants had complied with the dual-notice requirement.

Reasons for Granting the Writ.

I.

The Capehart Act was enacted in 1955[7] to implement and satisfy the need for financing of military housing. The orginal act failed to make mention of any bonding requirements. In 1956 the Capehart Act was amended[8] as follows:

> "Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of Section 270a of Title 40 [The Miller Act], and no additional bonds shall be required under said Section."

Following the amendment, the Secretary of Defense prescribed the use of a form of bond to be used on Capehart constructions. The form prescribed did not comply with the "provisions of section 270a of Title 40", the Miller Act, but was rather a 1947 FHA dual obligee form of bond. Subsequently, in May, 1957, a

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[7]69 Stat. 651, 40 U.S.C. §1594.

[8]Housing Act of 1956, ch. 1929, §507, 70 Stat. 1110, 42 U.S.C. §1594(a):

modified FHA form was prescribed so as to bring the bond form to its current posture. Under the modified form, before suit could be instituted against the surety, a preliminary notice had to be given to any two of the following: (1) the principal, in this case Hayes, Inc. or (2) any of the obligees, in this case Nike Village or the lender, or (3) the surety, in this case Continental. Under the Miller Act, however, such preliminary notice need be given only to the principal (prime-contractor) and then only in cases where the claimant had no direct contractual relationship with such principal. 40 U.S.C. §270b(a).

In 1962, decisions by the Eighth and Tenth Circuit Courts of Appeal[9] held that suits against Capehart sureties could not be maintained where the preliminary notice, although adequate under the Miller Act, 40 U.S.C. §270b, did not comply with the Capehart bond form. Both cases ignored the plain language of the Capehart Act 1956 Amendment and a previous decision of the Fifth Circuit Court of Appeals[10] holding that the provisions of the Miller Act apply to suits on a Capehart bond just as they do to suits on a Miller Act bond.[11]

Since 1962, the conflict as to whether or not actions against Capehart sureties are governed by the Miller

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[9]*Continental Casualty Company v. United States for Use of Robertson Lumber Company*, 305 F. 2d 794 (CCA 8, 1962), cert. den. 371 U.S. 922; *United States for Use of Miles Lumber Company v. Harrison and Grimshaw Construction Company*, 305 F. 2d 363 (CCA 10, 1962), cert. den. 371 U.S. 920.

[10]*Lasley v. United States for Use of Westerman*, 285 F. 2d 98 (CCA 5, 1960).

[11]The dissent by Judge Pickett in *Miles Lumber Company* clearly recognized the inconsistency of the opinion of the Tenth Circuit Court of Appeals with the prior decision of the Fifth Circuit Court of Appeals.

Act has continued to rage. This conflict has concerned itself with questions involving the time within which the surety must be sued, the form of preliminary notice to be given to the surety, the place where parties to actions against the surety may be served, the capacity of the parties to sue or be sued, and the Court where suits against the sureties must be brought.

a. Statute of Limitations.

The Capehart bond form provides for a statute of limitations for institution of suit within one year from the date the principal or prime contractor completed his work of improvement. The Miller Act provides for a statute of limitations of one year from the date the claimant completes his work. As previously pointed out, while the Eighth and Tenth Circuit Courts of Appeal have held that the Miller Act preliminary notice requirements were not applicable to Capehart projects[12] subsequent decisions of the Eighth Circuit Court of Appeals and District Courts within said Circuit have held that the Miller Act statute of limitations was applicable to actions against a Capehart surety and have ignored the different statute of limitations provided for by the Capehart bond form.[13]

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[12]*Continental Casualty Company v. United States for Use of Robertson Lumber Company, supra; United States for Use of Miles Lumber Company v. Harrison and Grimshaw Construction Company, supra.*

[13]*Koppers Company v. Continental Casualty Company*, 337 F. 2d 499, 506 (CCA 8, 1964); *Travis Equipment Co. v. D & L Construction Co.*, 224 F. Supp. 410 (DC Mo. 1963) affirmed, *Missouri-Illinois Tractor & Equipment Co. v. D & L Construction Company & Associates*, 337 F. 2d 507 (CCA 8, 1964); *Economy Form Corporation v. Trinity Universal Insurance Co.*, 234 F. Supp. 930 (DC N.D. 1964).

b. Adequacy of Form of Notice.

As to the propriety of the form of the preliminary notice, the Courts have looked to both the Miller Act and the Capehart bond form provisions and have applied the rule most liberal as to the particular claimant.[14]

c. Jurisdiction for Service of Process.

When a question of the validity of the service of process beyond the physical jurisdiction of the trial court has been raised, the Circuit Courts of Appeal have divided as to whether or not the Miller Act cases control. The Tenth Circuit Court of Appeal's has held that Capehart construction is not public construction and accordingly, service beyond the physical jurisdiction of the Court is invalid.[15] The Eighth and Fifth Circuit Courts of Appeal, however, have held, in reliance upon the Miller Act, such service is proper.[16]

d. Capacity to Sue and Be Sued.

Where the issue has been raised *re* the capacity of the parties to sue or be sued, the courts have applied the cases interpreting the Miller Act.[17]

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[14]*Continental Casualty Company v. Allsop Lumber Co.*, 336 F. 2d 445 (CCA 8, 1964), cert. den. 379 U.S. 968; *Russell v. Travelers Indemnity Co.*, 244 F. Supp. 419 (DC Mo. 1965); *Ireland's Lumber Yard v. Progressive Contractors Inc.*, 122 N.W. 2d 554 (Supreme Court of North Dakota, 1963).

[15]*United States for the Use of Miles Lumber Company v. Harrison and Grimshaw Construction Company, supra*, at p. 369.

[16]*Continental Casualty Company v. Allsop Lumber Company*, 336 F. 2d 445 (CCA 8, 1964), cert. den. 379 U.S. 968; *United States for Use of R. W. Fine v. Travelers Indemnity Co.*, 215 F. Supp. 455 (DC Mo. 1963); *Kappers Company v. Continental Casualty Company*, 337 F. 2d 499 (CCA 8, 1964); *Autry v. Williams & Dunlap*, 343 F. 2d 730 (CCA 5, 1965).

[17]*United States for Use of R. W. Fine v. Travelers Indemnity Co.*, 215 F. Supp. 455, 460 (suability of partnership under Rule 17(b) of the Rules of Civil Procedure).

e. Jurisdiction Over the Subject Matter.

The Miller Act provides that jurisdiction is exclusively within the Federal District Courts. The Capehart bond form provides that suit may be brought within either the Federal District Court or the State Court where the project was located. Despite the provisions of the Capehart bond form, the Fifth and Eighth Circuit Courts of Appeal have held that jurisdiction of suits against a Capehart surety is exclusively in the Federal Court by virtue of the Miller Act,[18] while the Tenth Circuit Court of Appeals has held that jurisdiction is exclusively in the State Courts.[19] Adding to the confusion are the decisions of the highest courts of two states holding that jurisdiction is exclusively in the Federal Courts[20] while in contrast the highest courts of two other states have ruled that jurisdiction between the Federal and State Courts are concurrent.[21]

In the case at bar, the Fifth Circuit Court of Appeals has held that the preliminary notice provisions requisite to suit against a Capehart surety set forth under the Miller Act have been superseded by the no-

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[18] *Lasley v. United States for Use of Westerman*, 285 F. 2d 98 (CCA 5, 1960); *Koppers Company v. Continental Casualty Company*, 337 F. 2d 499, 506 (CCA 8, 1964).

[19] *United States for Use of Miles Lumber Company v. Harrison & Grimshaw Construction Company*, 305 F. 2d 363 (CCA 10, 1962), cert. den. 371 U.S. 920; *United States for Use of General Accident Fire & Life Assurance v. McGuire Homes Inc.*, 186 F. Supp. 659 (D.C. Mass. 1959).

[20] *Gypsum Contractors Inc. v. American Surety Company*, 37 N.J. 315, 181 A. 2d 174 (New Jersey); *cf. Minneapolis-Honeywell Regulator Co. v. Terminal Construction Corp.*, 41 N.J. 500, 197 A. 2d 557; *Ireland's Lumber Company v. Progressive Contractors, Inc.*, 122 N.W. 2d 554 (North Dakota 1963).

[21] *Allsop Lumber Company v. Continental Casualty Company*, 73 N.M. 64, 385 P. 2d 625 (New Mex., 1963); *Robson v. United Pacific Insurance Co.*, 391 S.W. 2d 855 (Mo. 1965).

tice requirements of the Capehart bond form. *It is submitted that the instant decision is in direct conflict with the foregoing decisions wherein it has been held, in actions against Capehart sureties, that the statute of limitations provided for by the Miller Act prevails over the statute of limitations provided for in the Capehart bond form, and those decisions holding that the Miller Act confines jurisdiction, in actions against Capehart sureties, exclusively to the federal courts despite Capehart bond provisions conferring concurrent state and federal jurisdiction.*

Moreover, the opinion of Fifth Circuit Court of Appeals conflicts with the holdings of three earlier decisions reached by that court. *Lasley v. United States for the Use of Westerman,* 285 F. 2d 98 (CCA 5, 1962); *Continental Casualty Company v. United States for the Use of Conroe Creosoting,* 308 F. 2d 894 (CCA 5, 1962) and *Autry v. Williams and Dunlap,* 343 F. 2d 730 (CCA 5, 1965).[22]

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[22]In *Lasley,* the Fifth Circuit held that the concurrent jurisdiction provided for by the Capehart bond form should be disregarded and that by virtue of the Miller Act, actions against Capehart sureties were exclusively in the Federal Courts. In *Autry,* the Fifth Circuit in an action on a Capehart bond, held in reliance on the Miller Act, that extraterritorial use of process was proper. In addition, in *Autry,* the Fifth Circuit in footnote 30 on page 730 recognizes the sufficiency of a preliminary notice given in a "timely and proper" manner, as required by the Miller Act. In *Creosoting,* the defendant Continental argued that the claimant, being a sub-subcontractor to a subcontractor, was under the terms of Continental's bond too far removed from Hayes Inc. to recover under the bond. In rejecting such argument, the Fifth Circuit held that the claimant, although dealing with entities purportedly different from Hayes Inc., had in fact dealt directly with Hayes Inc. inasmuch as such other entities were the *alter egos* of Hayes Inc.

(This footnote is continued on the next page)

If one is to read at this point the simple language of the 1956 Capehart Amendment, it is difficult to understand how the courts have allowed the aforementioned conflicts and inconsistencies to ~~coming~~ come into being. Without attempting any comment on the tortuous rationalizations employed by the various courts in attempting to explain the conflicts and inconsistencies,[28] it is suggested that all of such difficulties have actually arisen only as a result of the failure to accept the plain meaning of the language employed by Congress in the 1956 amendment. Although it is always difficult to argue about the "plain meaning of words", it is submitted that the language of the 1956 amendment compels the conclusion that the amendment simply provides for Miller Act bonds on Capehart constructions with the additional proviso that the sureties on such bonds, and nothing more, must be approved by the Secretary of Defense. If on review, this Court adopts a construction based upon such "plain meaning" it will dispense with the need for the rationalizations employed by the various courts, including the instant court, resolve the conflicts and inconsistencies which have plagued the various Federal and State courts, and, replace the anarchy existing in the Capehart construction area with a consistent rule of law.

In this connection, it is interesting to note that *alter ego*, recognized by the Fifth Circuit in the *Creosoting* case, is now totally rejected in the instant case. See Point III of Reasons for Granting the Writ of this Petition. In addition, such inconsistency is compounded, in that the basis for the Fifth Circuit decision in *Creosoting* is the use of interrogatories and answers thereto propounded in the matter now before this Court. See page 848, of 308 F. 2d and Civil Docket case number 2030, p. 1, Vol. 1, Record on Appeal, and Finding 28, p. 99, *Id.*

[28]See point II of the instant decision, subsections E and F, reported at pp. 976 and 977.

II.

The need for this Court to set at rest the foregoing difficulties is one which has been drawing increasing recognition. As early as 1962, in two Capehart construction cases, *Continental Casualty Company v. United States for Use of Robertson Lumber Company,* 305 F. 2d 794 (CCA 8, 1962) and *United States for Use of Miles Lumber Company v. Harrison and Grimshaw Construction Company,* 305 F. 2d 363 (CCA 8, 1962), petitions for certiorari were denied. 371 U.S. 922 and 371 U.S. 920. Subsequently, in 1963 the Honorable John W. Oliver, District Judge for the Western District of Missouri, in *Travis Equipment Company v. D & L Construction Company,* 224 F. Supp. 410, in commenting on Capehart confusion wrote at page 417:

> "We are, of course, in radical disagreement with the rationale and with the conflicting decisions of the Supreme Court of New Mexico reported as *Allsop Lumber Company v. Continental Casualty Company,* 385 P. 2d 625 (1963). We note in passing that the possibility of the 'judicial chaos' to which we alluded on page 474 of 215 Fed. Supp. is developing at a predictable rapid rate. *Not only are several of the United States Courts of Appeals in open and complete conflict, but the first two*[24] *of the potential fifty State Appellate Courts to decide the subject matter are also in open conflict.* We cannot believe that the Congress intended that the rights of suppliers of labor and material and of the bonding companies that write the statutory bonds for the United States Government

[24]Now four.

> Military housing projects were to be regulated by the chance geographical location of a particular military housing project." (Emphasis added.)

In 1964 the defendant in the instant action in the case of *Continental Casualty Company v. Allsop Lumber Company,* 336 F. 2d 445 (CCA 8, 1964), a Capehart case, filed a petition for certiorari to this Court seeking a review of the limited question of whether the Federal District Court had jurisdiction of Capehart projects under a non-Capehart provision, viz., 28 U.S.C. §1352. This petition, like its 1962 predecessors, was denied. 379 U.S. 968.

Since the beginning of 1964, the judicial chaos referred to by Judge Oliver has proliferated, with the Federal District and Circuit Courts of Appeal continuing to render the multi-varied and inconsistent decisions hereinbefore referred to. During the two year period from 1964 to date, the Capehart confusion has run unchecked with no less than 32 reported decisions having been rendered by courts confronted with various problems arising out of Capehart Construction.[25]

Recently in *50 Iowa Law Review 1217* (1965), the entire chaotic situation which has resulted from the 1956 amendment to the Capehart Act was brought into focus and the need for review by this Court poignantly and succinctly stated. In the concluding paragraph at page 1235 the reviewer comments:

> "The intent of Congress in enacting the 1956 Amendment to the Capehart Act can, in the final analysis, be determined only by Congress itself. That Courts have differed in their interpretations

[25]See Appendix "D".

of the Amendment is not surprising. Judicial confusion is the inevitable result of poor legislative draftmanship. In the absence of legislative revision, the best answer lies in a clarification by the Supreme Court. In order to insure uniformity in the determination of legal rights throughout the Nation, it is the necessary function of the Supreme Court to decide issues on which the Circuits disagree. *If ever a need existed for the exercise of that function, it exists today in the confusion surrounding the bonding requirements of the Capehart Act.* Whichever branch of the Government acts, that action should be forthcoming in the near future." (Emphasis added.)

III.

Turning, briefly, to the merits of petitioners' position, the Circuit Court of Appeals has for some inexplicable reason chosen to disregard completely the specific findings of fact made by the Trial Court. At the trial level petitioners took the position that the preliminary notice required of them, if any, in order to recover on Continental's bond, was that notice fixed by the Miller Act, 40 U.S.C. §270b.[26]

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[26]Parenthetically this was the identical position taken by Continental Casualty Company in the case of *Continental Casualty Company v. United States for the Use of Conroe Creosoting*, 308 F. 2d 849 (CCA 5, 1962), which arose out of the same construction project and involved the same contracting parties, where Continental Casualty Company on page 28 of its Opening Brief in said matter stated:

"While [Lasley v. United States er rel Westerman, 285 F. 2d 98 (CCA 5, 1960)] involved the Miller Act provisions regarding jurisdiction, the Miller Act provision regarding notice, would, of course, be equally applicable."

This position was sustained, without comment, by the Fifth Circuit Court of Appeals.

In the alternative, petitioners argued that if the preliminary dual-notice of the Capehart bond form did control, then, even in such event, notice sufficient to satisfy the bond form requirements had been given.

The three persons to whom notice might have been given in this case were Hayes, Inc., Nike Village and Continental and as hereinbefore set forth, notice to any two of the foregoing would have satisfied the bond form requirement.

The trial court found that written notice was given to Hayes Inc. and Nike Village and, in addition, found that Continental had, within the requisite time, obtained actual knowledge of petitioners' claim including the nature and extent thereof.[27]

Despite such specific findings the Fifth Circuit Court of Appeals, some four years after the trial of the matter, concluded not only that the Miller Act did not control (ignoring, as hereinbefore set forth, its prior decision in *Lasley v. United States for Use of Westerman, supra*), but in addition concluded that because Hayes, Inc. and Nike Village were both notified by the same single piece of paper rather than by separate pieces of paper to each, dual—notice as specified in the bond form had not been given.[28]

Setting aside the additional fact that the third person to whom notice could have been given, namely Con-

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[27] Findings 23, 24, and 25 p. 98 of Vol. 1 of the Record on Appeal. Finding 4 on p. 91 identifies Nike Village as being a part of the Hayes Organizations.

[28] On p. 978 the court states:

"But to conclude that, because Nike Village knew what Hayes knew, only notice to Hayes is required would ignore the clear bond requirement of separate notice to two of several designated parties."

tinental, had at all requisite times actual knowledge of all of the particulars required by the bond form, the Fifth Circuit Court of Appeals' position favoring two pieces of paper over one, surely achieves a high water-mark in sustaining form over substance.

IV.

The questions presented by this Petition, particularly that concerning the applicability of the Miller Act to Capehart bonds, are deserving of review by this Court for two principal reasons. In the first instance, the public interest requires that the myriad of conflicting decisions of the Circuit Courts of Appeal and highest State Courts be resolved so that there can be uniformity of decision regarding Capehart construction and congressional enactments. The resolution of the problems presented by the 1956 Amendment to the Capehart Act is important to those members of the construction industry who have been called upon to construct housing units for the Armed Forces of the United States and whose rights are yet to be resolved in the Courts.[29] The resolution is similarly important to that segment of the financial community known as the surety industry. Additionally, the resolution is important to the jurists, both trial and appellate, federal and state, who must continue to cope with the vast spectrum of problems created by the 1956 Amendment. While it may very well be true that no Capehart construction has been recently commenced, it is far too late to utilize such fact as a basis for arguing against review by this Court.

This very argument was advanced twice during the year 1962 when the cases of *United States for Use of*

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[29]See Appendix E.

Miles Lumber Company v. Harrison and Grimshaw Construction Company, 305 F. 2d 363 (CCA 10, 1962), cert. den. 371 U.S. 920 and *Continental Casualty Company v. United States for Use of Robertson Lumber Company,* 305 F. 2d 794 (CCA 8, 1962), cert. den. 371 U.S. 922, were tendered to this court for review. Since that time numerous decisions have continued to be reported arising out of Capehart constructions, which decisions have touched upon significant and important issues including the jurisdiction of the Federal Courts.

As hereinbefore set forth, such decisions have resulted in a reign of unbridled chaos. Congress has not repealed or otherwise amended the Capehart Act. Additional construction may be commenced at any time. Decisions involving the Act continue to be reported. In 1966 alone, to the date of filing this Petition, there have been five more reported decisions involving Capehart housing construction. Numerous cases arising out of Capehart construction are still not resolved,[30] although the precise number of cases still pending, of course, cannot be accurately determined. No longer should the determination of significant rights of the parties be made dependent upon the obviously incorrect argument that Capehart constructions are moot. Four years of continuing decisions conclusively belies that Capehart is a moot issue.

Secondly, the trial court found that petitioners had rendered valuable services to the construction of a military housing project and, having complied with the necessary preliminary notices, were entitled to recovery from the surety for the prime contractor. On review,

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[30]See Appendix E.

the Circuit Court acknowledged that the services were rendered, did not dispute that the surety had actual knowledge of petitioners' claim, did not dispute that the general contractor received written notice of the petitioners' claim and did not dispute, that through the same written notice the third person to whom notice could have been given, *i.e.* Nike Village, did also receive notice. Despite such acknowledgments the Circuit Court of Appeals concluded that the $175,199.00 due and unpaid to petitioners should be denied them because notice was transmitted by one document instead of two. It is submitted that this Court, in its role of supervising the Federal judiciary and preventing the erosion of sound legal principles, should review the result achieved by the Fifth Circuit Court of Appeals.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A".

Opinion of the United States Court of Appeals for the Fifth Circuit.

In the United States Court of Appeals, for the Fifth Circuit.

Continental Casualty Company, Appellant, versus C. O. Brand, Inc., and Hartford Accident and Indemnity Company, Appellees. No. 20468.

Appeal from the United States District Court for the Western District of Texas.

(January 25, 1966.)

Before Tuttle, Chief Judge, Rives, and Widsom, Circuit Judges.

Wisdom, Circuit Judge: The decisive issue before the Court is the validity of the dual notice provision in the standard Capehart Act[1] payment bond executed on a form prescribed by the Secretary of Defense. This provision requires, as a prerequisite to suit on the bond, that a Capehart Act supplier give notice of default to any two of the following parties: (1) the prime contractor; (2) any one of the obligees; and (3) the surety. A Miller Act[2] supplier who deals with a subcontractor must give notice of default before commencing suit against the prime's surety, but is required to notify only one person, the prime contractor. The defendant-appellant contends that the plaintiffs, claimants on a Cape-

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[1]Act of August 11, 1955, Public Law 84-345, 69 Stat. 646 ff., as amended by Act of August 7, 1956, Public Law 84-1020, 70 Stat. 1110, 12 USC §§1748 ff. and 42 USC §§1594 ff.

[2]49 Stat. 795 (1935) 40 USC §270a et seq.

hart Act bond, failed to give the required dual notice.[3] The plaintiffs-appellees assert that the Miller Act's liberal notice provision controls Capehart Act bonds; that, accordingly, the Secretary of Defense had no authority to provide for dual notice of default.

We hold, first, that the Miller Act single notice provision should not be read into a Capehart Act bond. The Capehart Act, as amended, delegates to the Secretary of Defense authority to require Capehart payment bonds containing more stringent notice provisions than are contained in Miller Act bonds. This conclusion is not inconsistent with decisions of this Court holding that the Miller Act controls jurisdiction for actions by suppliers against the prime contractor and the surety. See *Autrey v. Williams and Dunlap*, 5 Cir. 1965, 343 F. 2d 730; *Lasley v. United States for use of Westerman*, 5 Cir. 1960, 285 F.2d 98. Second, we hold that the district court's finding that the claimants here gave the required dual notice is clearly erroneous. We reverse.

I.

Hal Hayes, Texas, Inc. was the prime contractor, "eligible bidder", on a Capehart project for the construction of 410 military housing units at Fort Bliss, Texas, at a contract price of $6,473,000. The Capehart Act and contract requires the eligible bidder: (1) to

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[3]Paragraph 4a of the bond reads:

"4. No suit or action shall be commenced hereunder by any claimant,

(a) Unless Claimant shall have given written notice to any two of the following: The Principal; any one of the Obligees, or the Surety above named, before the expiration of the period referred to in condition 2 above, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. . . ."

organize a corporation, termed the "mortgagor-builder", to hold title to the project until construction is completed; (2) to obtain loans from lending institutions, "mortgagee-lenders", in an amount sufficient to cover the entire cost of the project, including profit; (3) to furnish a performance bond to protect the United States and a payment bond to protect the laborers and material men.[4] Complying with these requirements, Hayes organized three corporations as mortgagor-builders (referred to collectively as Nike Village), obtained the necessary financing from two lending institutions, and gave three performance and payment bonds aggregating the full contract price. Continental Casualty Company, here the defendant-appellant, was the surety on the bonds; Nike Village and the lenders were the dual obligees on the bonds.

April 30, 1959, Hayes, through Winn Contractors, Inc.[5] entered into a written subcontract for the projects earthwork with C. O. Brand Co., an experienced

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[4]The financing arrangements permit utilization of private funds (protected by Government mortgage insurance) for Capehart housing construction. Congress devised the scheme because it was reluctant to make large appropriations for new housing needed to help retain skilled personnel in the services. Under the plan, private units own the projects under construction. When the projects are completed the United States assumes ownership and pays off the mortgage in installments with funds that otherwise would have been expended in quarters allowances for military personnel. See Note, 50 Iowa L.Rev. 1217, 1218-19 (1965).

[5]Hayes dealt with the subcontractors through Winn Contractors, Inc. Hayes wholly owned and controlled Winn. It is conceded for purposes of this appeal, that the contract with Winn was designed to enable Hayes to escape liability to suppliers of labor and materials. On appeal, Continental admits that Hayes and the surety could not escape liability on the payment bonds by relying on this fragile link in the chain of subcontracts.

contractor. The contract price was the lump sum of $148,000. Hayes knew that this figure was a gross understatement of the cost of the work. Hayes and Brand had a secret oral agreement that, regardless of the written contract, Hayes was to pay Brand on a unit-price basis for the work performed. The written contract was a sham to deceive their sureties as to the extent of their obligations and thereby protect their limited bonding position with their sureties.

Unluckily for Brand, Hayes reneged on his gentlemen's agreement and insisted on Brand's performing the written subcontract in strict accordance with its ruinous terms. Financial difficulties beset Brand. July 20, Brand wrote Winn requesting adjustment of the subcontract and estimating that $211,837.95 would be necessary to complete it. July 23, Brand wrote a similar letter to Hayes and Winn. No such letter was sent to the surety, Continental, or to the obligees on Continental's Capehart payment bond with Hayes. July 29, 1959, Brand, totally lacking in funds, unable to meet payrolls, and unable to pry loose any payments from Hayes, abandoned the job. At that time Hayes had made progress payments to Brand amounting to $134,000. Hayes called upon Brand's surety, Hartford Accident and Indemnity Company, to complete the subcontract under Brand's performance bond. Hartford refused. Hayes eventually completed the work at an expense of about $50,000.

Brand's unpaid suppliers of labor and materials brought suit against Continental on its payment bonds with Hayes, and against Hartford on its payment bond with Brand. The suppliers obtained judgment against Hartford aggregating $86,998.94. Hartford paid the

judgments, taking subrogations and assignments from the suppliers. Brand then brought this action against Hayes and Continental. Hartford, as subrogee and assignee of the claims of Brand's suppliers of labor and materials, joined Brand's action against Hayes and Continental.

The district court found that Hayes had fraudulently plotted to cause Brand's financial collapse.[6] Accordingly, the court annulled the subcontract between Hayes and Brand, found that a reasonable subcontract price would be $283,547.33, and entered judgment in quantum meruit against Hayes and Continental in the aggregate sum of $149,843.74 ($62,844.80 to Brand and $86,998.94 to Hartford). Continental appealed.

On appeal, Continental does not question the district court's finding that Hayes was guilty of fraud vis-a-vis Brand. Continental contends that Brand's agreement with Hayes to conceal the extent of their commitments worked a fraud on the surety. We do not reach this

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[6] "The acts and conduct of the Hayes Corporations, their officers, agents and employees, . . . were all part of a general plan, plot and scheme to: (1) obtain the signatures of subcontractors to written contracts which were at a variance with prior oral agreements and understandings and to thereby require said subcontractors to agree, in writing, to do work for less money than they expected to receive; (2) do work other and more than they thought was being required of them; (3) to obtain Performance Bonds and Payment Bonds for the benefit of the Hayes Corporations, well-knowing that the subcontractors, as principals, would not be able to perform the work required of them for the compensation agreed upon; (4) avoid payment of their obligations justly due by refusing to pay or by shifting the obligations to pay to the sureties of the subcontractors; (5) keep and maintain the subcontractors on the construction projects by further promises and representations; and (6) extract letters and documents from the subcontractors purporting to release and exculpate Hayes and the Hayes Corporations and organizations from and of any liability, responsibility, claim and demand."

point, because we agree with Continental's contention that the claimants failed to give the dual notice required as a prerequisite to suit on a Capehart Act bond.

II.

We discuss, first, the question whether the single notice provision of the Miller Act, 40 USC §270b(a), rather than the express dual notice provision of the Capehart payment bond, controls a suit on the bond.

A. Since 1894, the Heard Act and its successor, the Miller Act, have required contractors of public works in the United States to provide bonds for the protection of their suppliers.[7] The Capehart Military Housing Act, as originally enacted in 1955, did not refer to the Miller Act nor did it specifically require that the eligible bidder provide a payment bond for protection of suppliers of labor and materials. Nevertheless, the Secretary of Defense and the Commissioner of Housing required the bond during the first year following passage of the Capehart Act.[8]

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[7]The Heard Act, ch. 280, 28 Stat. 278 (1894), provided for a single bond to protect both the suppliers and the United States. The United States had the exclusive right to sue on the bond for the first six months after completion of the work. This often resulted in extended delays to the suppliers. The Miller Act was intended to eliminate the difficulties by providing for both a performance bond and a payment bond, giving the suppliers the right to sue on the payment bond. See MacEvoy v. Tompkins Co. 1944, 322 U.S. 102, 104.

[8]After enactment of the Capehart Act, the Commissioner of Housing promulgated comprehensive regulations (21 Federal Register 319; 20 Federal Register 5969, 5970.), Sec. 292a27 of which, entitled "Completion Assurance", required a bond to be furnished satisfactory to the Commissioner and the Military. See Hart, The Purpose, Form and Problems of the Capehart Housing Program, 1961 A.B.A. Section of Insurance, Negligence & Compensation Law 231, 237&n. 22.

To clarify the relationship of Miller Act bond require ments to Capehart housing projects,[9] Congress amended the Capehart Act, August 7, 1956, to provide:

> Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40 [The Miller Act], and no additional bonds shall be required under such section.[10]

This amendment to the Capehart Act intensified the ambiguous relationship between that act and the Miller Act.

The Secretary's standard bond was promulgated in 1957 after numerous meetings attended by representatives of bonding companies, the Department of Defense, the Army, Navy, Air Force, Federal Housing Administration, and interested lending institutions.[11] Apparently, all of the agencies read the amendment as delegating to the Secretary of Defense discretionary authority to write a payment bond especially suited to Capehart housing projects.

Section 270(a) of the Miller Act provides that contractors for certain public works shall furnish a pay-

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[9]102 Cong. Rec. 8874 (1956).

[10]Housing Act of 1956, ch. 1029, §507, 70 Stat. 1110, 42 USC §1594(a) (1958).

[11]Kenney, The Capehart Act Performance and Payment Bonds, 1961 A.B.A. Section of Insurance, Negligence & Compensation Law 251. The dual-obligee bond is Federal Housing Administration Form No. 2452CP. Ibid.

ment bond. Continental points out that the notice provision in §270b(a) is applicable only to contracts "in respect of which a payment bond is furnished under §270a . . ." But, Continental argues, the Capehart bond is *not* furnished under §270a; it is furnished under the Secretary's regulations under the 1956 amendment to the Capehart Act; therefore, §270b(a) of the Miller Act is not applicable to Capehart bonds. The language in the 1956 amendment providing that a bond satisfactory to the Secretary "shall be sufficient compliance with §270a [of the Miller Act]" does not disturb this conclusion, so the argument runs; that language means only that a single bond, the Secretary's, is required for Capehart projects. See Comment, 111 U.Pa.L.Rev. 1014, 1018 (1963).

On the other hand, Hartford and Brand contend that the amendment substitutes the Secretary's bond for the bond §270a of the Miller Act would otherwise require; that the remaining sections of the Miller Act conferring rights established by the bond required in §270a apply as well to a substitute bond; therefore the notice provision in §270b(a) is applicable to Capehart bonds. Accordingly, the appellees contend, the conflicting dual notice provision which the Secretary inserts is unauthorized and void. See Comment, 49 Va.L.Rev. 174, 179-80 (1963).

B. Little legislative history is available. The House and conference reports that accompanied passage of the 1956 amendment to the Capehart Act do not mention the question of single or dual notice. The Senate report declares: "In order to resolve a legal uncertainty concerning the bonding of contractors who build military housing . . . the bill provides that such contrac-

tors shall furnish bonds satisfactory to the FHA Commissioner and the Secretary of Defense. This change was recommended by the Department of Defense to conform to the usual FHA bonding requirements."[12]

HR 11742, the final clean bill enacted by Congress as the Capehart Act, succeeded and encompassed an earlier bill, HR 10157. Included as part of the record of the Committee Hearings on HR 10157 was a letter dated June 4, 1956, from the office of the Secretary of Defense to the Chairman of the Congressional Committee conducting the Hearings.[13] In part, the Secretary of Defense wrote:

> "It is also recommended that HR 10157 be amended *to make it clear that the provisions of the Miller Act (40 USC 270a) are not applicable to Title VIII Housing. It appears more appropriate to provide for use of the FHA dual obligee bond form for both performance and payment bonds.* The cost of FHA bond is substantially less than the cost of bond required by the Miller Act for public works, so that the proposed amendment will serve to decrease the cost of construction and otherwise facilitate contractual relationships. Accordingly, it is suggested that the following amendment be added to the bill:
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> 'Section 403(a) of the Housing Amendments of 1955 is amended by adding before the final sentence thereof the following: "Any such contract shall provide for the furnishing by the Contractor of a performance bond and a payment bond with

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[12]S.Rep. No. 2005, 84th Cong., 2d Sess. 10 (1956).

[13]See Hearings on H.R. 10157 before the House Committee on Banking and Currency, 84th Cong., 2d Sess. 195-96; 3 U.S. Code Cong. Adm. Ness (1956) 4509.

> a surety or sureties satisfactory to the Commissioner and the Secretary of Defense, or their designees, and the furnishing of such bonds shall be deemed sufficient compliance with the provisions of section 1 of the Act of August 24, 1935, and no additional bonds will be required under such section.'" (Emphasis added)

The language Congress used in amending the Capehart Act is virtually identical with that recommended by the Secretary of Defense in his letter to the Committee. The letter, however, like the amendment, refers to §270a only, and does not explain how the suggested amendment would affect other sections of the Miller Act. "Nevertheless" as the Supreme Court of New Jersey observed in discussing the effect of this letter, "the broad language used therein, i.e., that the amendment be adopted to 'make it clear that the provisions of the Miller Act (40 USC 270a) are not applicable to Title VIII Housing' (which includes Capehart housing), coupled with the reference to the approved FHA type bond which contains the provision permitting suit in the appropriate state or federal court [and, we add, the dual notice provision] should not be ignored. It lends persuasive force to the view expounded by the Eighth and Tenth Circuit Courts that by the 1956 amendment to the Capehart Act Congress intended to authorize the Secretary of Defense or his designee in his discretion to approve a bond which sanctioned the bringing of suit therein in a designated state court as well as in an appropriate United States District Court."[14] We do not go that far. But the letter does

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[14]Minneapolis-Honeywell Regulator Co. v. Terminal Constr. Corp., 41 N.J. 500, 514-15, 197 A.2d 557, 565-66 (1964).

show that the purpose of the amendment was to approve an FHA type bond denominated a "Dual-Obligee" bond and containing a dual notice provision.[15]

C. Understandably enough, courts have disagreed about the applicability of the Miller Act to Capehart bonds.[16] Courts agreeing in the result have diverged widely in the rationale for their holding.[17]

The Tenth Circuit has held that the Miller Act (other than §270a) is inapplicable to Capehart bonds, because Capehart housing projects are not "public works" within the meaning of the Miller Act. *United States ex rel. Miles Lumber Co. v. Harrison & Grimshaw Construction Co.*, 1962, 305 F.2d 263, cert. denied, 371 U.S. 920. This Court, disagreeing with the *Harrison & Grimshaw* rationale, has held that §270(b)-(b) of the Miller Act confers *jurisdiction* for materialmen's suits on Capehart bonds. *Autrey v. Williams & Dunlap*, 1965, 343 F.2d 730; *Lasley v. United States for use of Westerman*, 1960, 285 F.2d 98. Autrey and *Lasley* accept the principle that a "public work" within the Miller Act is "any work in which the United States is interested and which is done for the public and for which the United States is authorized to expend

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[15]See footnote 11.

[16]See Note, 50 Iowa L.Rev. 1217 (1965).

[17]E.g., compare United States ex rel. Miles Lumber Co. v. Harrison & Grimshaw Constr. Co., 305 F.2d 363, (10th Cir.), cert. denied, 371 U.S. 920 (1962), (Miller Act notice provision inapplicable to Capehart bonds because Capehart projects held not to be "public works" within meaning of Miller Act) and, Continental Cas. Co. v. United States ex rel. Robertson Lumber Co., 305 F.2d 794 (8th Cir.), cert. denied, 371 U.S. 922 (1962) (Miller Act notice provision inapplicable to Capehart bonds because Capehart notice provision is a "procedural" provision which Secretary of Defense may prescribe.)

funds."[18] Under this test, Capehart housing projects are public in nature even before title shifts to the United States.[19]

To construe the Capehart Act as entirely insulating Capehart bonds from the Miller Act would be to assume that Congress delegated to the Secretary of Defense virtually unlimited power to define the rights of suppliers of these important public projects. Something more than an ambiguous amendment to the Capehart Act is necessary before we will attribute to Congress an intention to abandon the policy implicit in the Heard and Miller Acts of defining by statute the rights of suppliers of public works. Similarly, the Eighth Circuit has said: "We do not regard the Robertson opinion [Continental Cas. Co. v. U.S. for Robertson Lumber Co., 1962, 305 F.2d 794, cert. denied, 371 U.S. 922] as taking Capehart bonds 'out of the Miller Act' in

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[18]Peterson v. United States ex rel. Marsh Lumber Co., 6 Cir. 1941, 1119 F.2d 145, 147 (federal flood control funds used for relocation of railroad bed and track). See also United States, to use of Noland Co., Inc. 1942, 316 U.S. 23, 29, 62 S.Ct. 899, 902, 86 L.Ed. 1241 (federal funds used to construct library at Howard University); United States ex rel. Gamerston & Green Lumber Co. v. Phoenix Assurance Co., N.D. Cal. 1958, 163 F.Supp. 713 (non-appropriated federal funds used to build library for use of personnel at military post).

[19]The "private" company building a project is a skeleton corporation with no interest in the property except to hold title until the United States assumes ownership upon the project's completion. The private funds financing the building are fully protected by Government mortgage insurance. The property upon which the houses are built is Government-owned. In addition, the United States provides specifications for the projects, regularly inspects work progress, and maintains substantial control over developments from start to finish. Finally, the housing projects have an important public purpose in that they are designed to improve the quality of the military by helping to retain skilled personnel. See Autrey v. Williams & Dunlap, 5 Cir., 1965, 343 F.2d 730, 734; Comment, 49 Va.L.Rev. 174, 175-79 (1963); Comment, 111 U.Pa.L.Rev. 1014 (1963).

every respect and particularly so far as jurisdictional matters are concerned." *Continental Casualty Co. v. Allsop Lumber Co.*, 1964, 336 F.2d 445, 451.

We carefully limited *Autrey* and *Lasley* to the narrow holding that the *jurisdictional* provision of the Miller Act, §270b(b), applies to Capehart bonds. We were reluctant to draw from an ambiguous statute an unnecessarily broad rule. Exercising similar caution, this Court addresses itself only to the specific question whether the notice provision of the Miller Act, §270b-(a), applies to this Capehart payment bond.

D. Although we consider Capehart projects "public works," what distinguishes them from the public works for which the Miller Act was designed is the absence of appropriated funds. This is the central fact in the realm of Capehart. As a result, the Secretary of Defense and the Federal Housing Commissioner found it necessary to contrive a complicated three-cornered legal structure: (1) Instead of a prime contractor, there is an "eligible bidder" who receives not a contract but a "letter of acceptability" which he undertakes to carry out at the risk of losing his security. (2) The "mortgagor-builder" is a nominal obligee. (3) The "lender" mortgagee is the only authentic obligee; and, upon default, since the mortgagee may call upon the FHA for its full insurance coverage, the rights of the obligees may be assigned to the FHA. Within this context, the Secretary of Defense, working closely with the FHA Commissioner, fashioned a bond suitable for the elaborate and unique financing scheme established in the Act. The 1956 amendment, providing for a bond "satisfactory to the Secretary", is completely meaningless unless it is construed as delegating flexible author-

ity to the Secretary to require an appropriate bond. At the same time, the absence in the amendment of a clear grant of exclusive authority to the Secretary and the reference to the Miller Act seem to indicate that Congress limited the scope of his authority to prevail over the Miller Act: Capehart bond provisions should prevail, when the provisions are reasonable and peculiarly suited to Capehart projects. The dual notice requirement appears to be just the sort of provision Congress must have had in mind in adopting the amendment the Secretary proposed.

It is evident that Congress envisioned an expansive role for the Secretary of Defense in administering Capehart projects. The Secretary has considerably more authority over Capehart projects than the contracting officer has over Miller Act projects. Indeed, the Capehart Act grants the Secretary almost complete control over the terms of the housing contract and over housing construction. "Each housing unit shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy." 42 USC §1594.

In an ordinary Miller Act project, notice by the subcontractor's materialmen of the subcontractor's default need go only to the prime contractor. The prime contractor has the option of advancing or withholding payments to the subcontractor. If the prime contractor advances payments, he may be able to prevent a loss from his miscalculation of costs by renegotiating with the government. In Capehart projects, however, the principal contractor, or "eligible bidder", is unable to renegotiate his contract because the amount available for the project is strictly limited to the amount of the

bid. Since the "eligible bidder" may be reluctant or unable to advance credit to a subcontractor, the surety may feel compelled to advance credit in order to avoid default. The Capehart surety therefore is as much in need of materialmen's notice of default as is the prime contractor in an ordinary Miller Act project. The Secretary's Capehart bond requirement that if notice is given to the "eligible bidder" it must also be given either to one of the bond obligees or to the surety achieves this result.[20]

Another reason why it is reasonable for the Secretary to require especially adequate notice of default to a Capehart surety is that the surety may be liable for a greater amount than a Miller Act surety. The penal amount of a Miller Act payment bond is one-half the contract amount, where the amount does not exceed $1,000,000, forty per cent of the amount when it is between $1,000,000 and $5,000,000, and, in any event, may not exceed $2,500,000.00. 40 USC §270a(a). The penal amount of the Capehart payment bond is not limited by statute and may be one hundred per cent of the contract price. In this case, Continental's payment bonds with Hayes for the Fort Bliss project aggregated the full contract price, $6,473,000.

"The interpretation placed upon [the Capehart Act] by the agencies charged with its enforcement is entitled to great weight". *Continental Casualty Co. v. United States ex rel. Robertson Lumber Co.*, 8 Cir. 1962, 305 F.2d 797, 799. The interpretation administrators of Capehart projects place upon the Capehart Act, as amended, fortifies our conclusion here. The Secretary

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[20]See Comment, 111 U.Pa.L.Rev. 1014, 1017 (1963).

of Defense, upon whose recommendation the 1956 amendment was enacted, obviously construed the enactment of the amendment as approval of his view that Miller Act provisions ware inapplicable to "the FHA dual obligee bond form" used on Capehart projects. The Federal Housing Administration, insurer of the mortgaged property which is the basis of the intricate Capehart financing, agreed with the Secretary.[21] And the United States General Accounting office has expressed the opinion that the Capehart bonds are "independently established" and that "the Miller Act is not controlling as to them."[22] "While we think that Congress intended that Capehart suppliers should have substantive bond protection essentially similar to that afforded Miller Act suppliers, we think also that Congress intended that the procedural provisions of Capehart bonds [for example, the notice provision] should be worked out and prescribed by the two agencies [Department of Defense and Federal Housing Administration] in light of the unique nature of Capehart construction of the peculiar problems which might be encountered in connection with such construction." *Robinson, supra,* 305 F.2d at 799.

E. Our decision here not to apply to Capehart payment bonds the Miller Act notice provision, §270(a), is not inconsistent with our earlier decisions in *Autrey* and *Lasley* to apply to the same bonds the Miller Act ju-

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[21]Hart, The Purpose, Form and Problems of the Capehart Housing Program, supra, note 4 at 238 & n. 26.

[22]United States General Accounting Office Letter B.59805, dated June 11, 1958, reported in Hart, The Purpose, Form and Problems of the Capehart Housing Program, supra note 4 at 238 & n. 27.

risdictional provision, §270b(b). The principal basis for the decision here is that in establishing a unique financial arrangement over which the Secretary of Defense has broad control Congress granted implied authority to the Secretary to establish reasonable notice provisions peculiarly suitable for a Capehart project. Nothing in the financing scheme implies a need for a jurisdictional provision different from that prescribed for suits by suppliers of public works in the Miller Act.

In addition, in *Autrey* the Court was unwilling to infer from an unclear statute Congressional sanction for a jurisdictional provision severely diluting the adequacy of suppliers' remedy by not providing for extraterritorial service of process as the Miller Act does. 343 F.2d at 735. By contrast, our refusal here not to apply the notice provisions of the Miller Act does not dilute the long-standing efforts of Congress to secure suppliers' rights. Applying the dual notice requirement does not seem unfair to the plaintiffs in this case. We are persuaded, in part, as was Judge Blackmun, "by the completely unexplained failure of [these] plaintiff[s] to avoid [the] difficulty in the first instance by taking the small trouble to give the dual notice so clearly required by the bond." *Robertson, supra*, 305 F.2d at 800. In the abesnce of a decision on point in this circuit, Hartford and Brand could not disregard the express notice provision of the bond on which they sue and could not justifiably rely upon a statutory ambiguity and conflicting decisions in other circuits to support a less stringent notice requirement.

F. The result we reach in this case is similar to the result reached by apparently every court that has con-

sidered the question,[23] although we may differ from some of the courts in rationale. For example, in *Continental Casualty Co. v. United States ex rel. Robertson Lumber Co.*, 8 Cir. 1962, 305 F.2d 797, 798, the court relied, at least, in part, upon its determination that a notice provision is "procedural" rather than "substantive" in finding that the Miller Act notice provision does not apply to Capehart bonds. "Procedural" and "substantive" are words so freighted with conflicting interpretations that we prefer not to apply them in the confusing area of the relationship of the Capehart Act to the Miller Act. We hold only that the 1956 amendment to the Capehart Act, when considered with the scheme of a Capehart project, expresses the will of Congress to delegate to the Secretary of Defense authority to write into Capehart bonds a dual notice provision.

III.

The remaining question is whether the district court erred in its findings that Brand complied with the dual notice provision of the Capehart bond.

The bond requires written and timely notice to any two of the following: (1) The principal, in this case Hayes; (2) any one of the obligees, in this case Nike

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[23]National State Bank v. Terminal Constr. Corp., 1963 D.N.J., 217 F.Supp. 341, aff'd, 3 Cir. 1964, 328 F.2d 315. United States ex rel. Miles Lumber Co. v. Harrison & Grimshaw Constr. Co., 10 Cir. 1962, 305 F.2d 363, cert. denied 371 U.S. 920. Continental Cas. Co. v. United States ex rel. Robertson Lumber Co., 8 Cir. 1962, 305 F.2d 794. United States, for use of Fogle v. Hal B. Hayes & Associates, Inc., 1963, N.D.Cal., 221 F. Supp. 260, 263. B. C. Richter Contracting Co. v. Continental Cas. Co., 1964, 41 Cal. Rptr. 98. Allsop Lumber Co. v. Continental Cas. Co., 1963, 73 N.M. 64, 385 P.2d 625 (dicta). Ireland's Lumber Yard v. Progressive Contractors, Inc., 1963, 122 N.W. 2d 554 (dicta).

Village and the lending institutions; (3) the surety, in this case the appellant, Continental.

There is no suggestion that claimants gave notice either to the lending institutions or to Continental. That leaves Hayes and Nike Village. Brand offers letters he wrote to Hayes and Winn on July 20, 1959, and July 23, 1959, as evidence of notice to his claim to Hayes. Brand further argues that because Hayes wholly owned and dominated NIKE, the letters also constitute notice to NIKE, thereby fulfilling the Capehart requirement of notice to two of the designated parties.

Hayes originally dominated Nike Village in the sense that the mortgagor-builder was a creature of the eligible bidder. But this is the case in every Capehart situation. The mortgagor-builder (Nike Village) is an entity established of doctrinaire necessity to own property upon which Capehart projects are built so that the property can be mortgaged in order to obtain building loans from private institutions.[24] But to conclude that, because Nike Village knew what Hayes knew, only notice to Hayes is required would ignore the clear bond requirement of separate notice to two of several designated parties. Such a result would ignore an essential part of Capehart financing that makes notice to the mortgagor-builder important even if notice is also given to the eligible bidder. Under Capehart procedure, the Housing Contract for the Fort Bliss project provides that, upon delivery of the contract, the eligible [bidder] must place in escrow *with the mortgagee* the mortgagor-builder's stock, endorsed in blank, and signed resignations of all

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[24]See Hart, supra, note 4 at 233.

the officers and directors of the mortgagor-builder.[25] Thus, at the time the contract is executed the lender (mortgagee) has such control over the mortgagor-builder that notice to the mortgagor-builder is also notice to the lender. This result comports with the purpose of the dual notice provision, which is to provide more adequate notice of default to the surety and lender, those responsible for financing the Capehart project.

Therefore, even if Brand's letters of July 20 and July 23 were timely sufficient notice to Hayes (which we do not decide), the letters were not also notice to Nike Village. The district court erred in finding that claimants in this case met the dual notice requirement of the Capehart bond.

We find unnecessary to address ourselves to other issues raised.

The judgment of the district court is REVERSED.

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[25]Article XV of the Housing Contract provides:

(24) The eligible builder simultaneously with the delivery of this Housing Contract shall deposit in escrow with the mortgagee resignations of the officers and directors of the mortgagor-builder, together with certificates, endorsed in blank, representing all of the capital stock of the mortgagor-builder, for delivery to the Department either (i) upon issuance of the Determination of Completion and the final endorsement of the mortgage note for mortgage insurance by the Commissioner, or (ii) upon complete termination of the Housing Contract for the convenience of the Department prior to completion of the project, whichever event occurs first. The escrow agreement shall be in a form acceptable to the Department and the Commissioner. . . .

APPENDIX "B".

§270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a per-

formance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

§ 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim

is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

§ 270b. Same; rights of persons furnishing labor or material

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the persons suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

APPENDIX "C".

§ 1594. Contracts for construction—Contract provisions; competitive bids

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction

of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

Definition of "eligible bidder"

(b) For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

Acquisition of capital stock of property covered by mortgage

(c) Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under the title VIII of the National Housing Act, as amended by the Housing Amendments of 1955, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon, and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

Opinion as to title to property; guarantee, title search and title insurance

(d) On request by the Secretary of Defense, the Attorney General shall furnish to the Secretary of Defense, or his designee, an opinion as to the sufficiency of title to any property on which it is proposed to construct housing, or on which housing has been constructed, under this section. If the opinion of the Attorney General is that the title to any such property is good and sufficient, the Secretary of Defense is authorized to guarantee, or enter into a commitment to guarantee, the mortgagee, under a mortgage on such property which is insured under sections 1748-1748g and 1748h—1 to 1748h—3 of Title 12, against any losses that may thereafter arise from adverse claims to title. None of the proceeds of any mortgage loan hereafter insured under such sections 1748-1748g and 1748h—1 to 1748h—3 of Title 12 shall be used for title search and title insurance costs: *Provided,* That if the Secretary of Defense, or his designee, determines in the case of any housing project, that the financing of the construction of such project is impossible unless title insurance is provided, the Secretary may provide for the payment of the reasonable costs necessary for obtaining title search and title insurance. Any payments by the Secretary hereunder shall be made from the revolving fund established under section 1594a(g) of this title. Any determination by the Secretary under the foregoing proviso shall be set forth in writing, together with the reasons therefor. The Committee on Armed Services of the Senate and House of Representatives shall be promptly notified of each such determination, and of the amount of any payment made by the Secretary for title search and title insurance costs.

APPENDIX "D".

1964, 1965 and 1966 cases arising out of Capehart constructions:

1964

Continental Casualty Company v. Allsop Lumber Company, 336 F. 2d 445 (C.C.A. 8, 1964);

Koppers Company v. Continental Casualty Company, 337 F. 2d 499 (C.C.A. 8, 1964);

Missouri-Illinois Tractor & Equipment Co. v. D & L Construction Company, 337 F. 2d 507 (C.C.A. 8, 1964);

D & L Construction Company v. Triangle Electric Supply Company, 332 F. 2d 1009 (C.C.A. 8, 1964);

Fine v. Travelers Indemnity Company, 233 F. Supp. 672 (D.C. Mo. 1964);

Triangle Electric Supply Company v. Johave Electric Co., 234 F. Supp. 293 (D.C. Mo. 1964);

Grinders and Shaw Inc. v. Federal Insurance Company; 234 F. Supp. 753 (D.C. S.C. 1964);

Economy Forms Corporation v. Trinity Universal Ins. Co., 234 F. Supp. 930 (D.C. N.D. 1964), aff'd, 340 F. 2d 613 (C.C.A. 8, 1964);

B. C. Richter Contracting Co. v. Continental Casualty Company, 230 Cal. App. 2d 491 (Cal. App. 1964);

Minneapolis-Honeywell Regulator Company v. Terminal Construction Corporation, 197 A. 2d 557 (N.J. 1964);

United States for Use of Griffin v. Atlantic Contractors, Inc., 231 F. Supp. 356 (D.C. N.C. 1964).

1965

Sill Corporation v. United States, 343 F. 2d 411 (C.C.A. 10, 1965);

Autrey v. Williams and Dunlap, 343 F. 2d 730 (C.C.A. 5, 1965);

Anthony Grace & Sons, Inc. v. United States, 345 F. 2d 808 (Ct. Cl. 1965);

Autrey v. Williams and Dunlap, 346 F. 2d 1007 (C.C.A. 5, 1965);

Anthony P. Miller, Inc. v. United States, 348 F. 2d 475 (C.C.A. 5, 1965);

Triangle Electric Supply Co. v. Mojave Electric Co., 238 F. Supp. 815 (D.C. Mo. 1965);

Winston v. United States, 342 F. 2d 750 (C.C.A. 9, 1965);

S. S. Silberblatt, Inc. v. United States, 333 F. 2d 545 (C.C.A. 5, 1965);

L & E Company v. United States, 351 F. 2d 880 (C.C.A. 9, 1965);

Gersten Construction Co. v. United States, 346 F. 2d 973 (Ct.Cl. 1965);

Russell v. Travelers Indemnity Company, 244 F. Supp. 419 (D.C. Mo. 1965);

National Union First Insurance Co. of Pittsburgh v. D & L Construction Co., 333 F. 2d 169 (C.C.A. 8, 1965);

Robson v. United Pacific Insurance Co., 391 S.W. 2d 855 (Mo. 1965);

United States for Use of Robertson Lumber Company v. Continental Casualty Company, 340 F. 2d 958 (C.C.A. 8, 1965);

National Landscaping Co., Inc. v. Continental Casualty Co., 238 F. Supp. 793 (D.C. Mo. 1965).

1966

Seabord Surety Co. v. United States, 355 F. 2d 139 (C.C.A. 9, 1966);

Tufano Contracting Corp. v. United States, 356 F. 2d 535 (C.C.A. 9, 1966);

Heers v. United States, 357 F. 2d 344 (Ct.Cl. 1966);

Black, Raber-Kief & Associates v. United States, 357 F. 2d 355 (Ct.Cl. 1966);

Continental Casualty Company v. C. O. Brand, Inc., 355 F. 2d 969 (C.C.A. 5, 1966).

APPENDIX E.

Counsel for petitioners have still pending in their own files the following ten cases arising only out of the Beale Air Force Base project, a Capehart Military Housing Act construction project in California.

Continental Casualty Company v. Hartford Accident and Indemnity Company and Country Boys, Inc., 3 Civ. 11110 (this case is on appeal in the District Court of Appeal of California);

B. C. Richter Contracting Co., Inc. v. Hal B. Hayes and Associates and Continental Casualty Company, Yuba County Superior Court case No. 14960;

B. C. Richter Contracting dba R & E Materials v. Hal B. Hayes and Associates and Continental Casualty Company, Yuba County Superior Court case No. 14491;

Lord & Bishop Inc. v. C. O. Brand, Inc., Hartford Accident and Indemnity and Continental Casualty Company, Sacramento Municipal Court case No. 63937;

United States for the Use of C. O. Brand Inc. v. Hartford Accident and Indemnity Company, with cross-complaint of *Continental Casualty Company v. C. O. Brand, Inc. and Anchor Casualty Company*, United States District Court, Northern District of California, Northern Division Case No. 8284;

United States for the Use of Tay-Holbrook Inc. v. C. O. Brand, Inc., with cross-complaint by *Continental Casualty Company, against Anchor*

Casualty Company, United States District Court, Northern District of California, Northern Division Case No. 8031;

United States for Use of Grinnell Company of the Pacific v. C. O. Brand, Inc. with cross-complaint of *Continental Casualty Company against Anchor Casualty Company,* United States District Court, Northern District of California, Northern Division Case No. 8035;

C. O. Brand, Inc. v. Wurtsmith and Continental Casualty Company, Yuba County Superior Court case No. 15169;

C. O. Brand, Inc. v. Hal B. Hayes, Inc. and Continental Casualty Company, Yuba County Superior Court case No. 15170;

C. O. Brand, Inc. v. Hal B. Hayes and Continental Casualty Company, Yuba County Superior Court Case No. 15171.

Obviously, these cases from counsels' own files cannot and do not constitute the sole remaining uncompleted litigation.